DOCUMENT RESUME

ED 083 933 HE 004 803

AUTHOR	Cazier, Stanford
TITLE	Student Discipline Systems in Higher Education.
INSTITUTION	ERIC Clearinghouse on Higher Education, Washington, D.C.
SPONS AGENCY	American Association for Higher Education, Washington, D.C.
REPORT NO	ERIC-HE-RR-7
PUB DATE	73
NOTE	53p.
AVAILABLE FROM	Publications Department, American Association for Higher Education, 1 Dupont Circle, Suite 780, Washington, D. C. 20036 ($2.00)
EDRS PRICE	MF-$0.65 HC-$3.29
DESCRIPTORS	*College Students; *Court Cases; *Discipline; *Discipline Policy; *Higher Education; Literature Reviews; Student Rights

ABSTRACT

This paper reviews the literature that documents both the central events and commentary on the important developments in student discipline. Following a brief historical overview and an analysis of the implications of the precedent-setting Dixon case (1961), which has strongly stimulated and influenced recent developments in student discipline systems, the author devotes extensive discussion to the issues of substantive and procedural due process. (MJM)

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Student Discipline Systems in Higher Education

Stanford Cazier

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Student Discipline Systems in Higher Education

Stanford Cazier

ERIC/Higher Education
Research Report No. 7
1973

Prepared by the
ERIC Clearinghouse
on Higher Education
The George Washington University
Washington, D. C.

Published by
the American Association
for Higher Education
One Dupont Circle, Suite 780
Washington, D. C. 20036

This publication was prepared pursuant to a contract with the National Institute of Education, U. S. Department of Health, Education and Welfare. Contractors undertaking such projects under government sponsorship are encouraged to express freely their judgment in professional and technical matters. Prior to publication, the manuscript was submitted to the American Association for Higher Education for critical review and determination of professional competence. This publication has met such standards. Points of view or opinions do not, therefore, necessarily represent official views or opinions of either the American Association for Higher Education or the National Institute of Education.

Foreword

During the past decade, there have been a number of important developments in student discipline. This paper reviews the literature that documents both the central events and commentary on these events. Following a brief historical overview and an analysis of the implications of the precedent-setting *Dixon* case (1961), which has strongly stimulated and influenced recent developments in student discipline systems, the author devotes extensive discussion to the issues of substantive and procedural due process. This consideration of major developments related to the many specific aspects of student discipline should be helpful to all those concerned with these issues. Stanford Cazier is president of the California State University at Chico.

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Historical Overview

Institutions of higher education are by definition, practice, and aspiration dedicated to the creation and maintenance of special learning environments. As an adjunct to that end, most institutions have established student discipline systems. In varying degrees, these systems consist of regulations circumscribing and proscribing certain types of behavior deemed to be inimical to the learning environment, and penalties that can accrue to behavior in breach of the regulations.

Throughout most of its history, American higher education has exercised rather unrestrained discretion in instituting and administering student discipline. In the half century prior to the 1960's, colleges and universities engaged with some frequency in the practice of summarily suspending, even expelling, students without the benefit of substantive and procedural safeguards, often accorded the common criminal. It was possible for a student to be dismissed from a school which had not published a clearly delineated set of misconduct rules, had not provided the student with a statement of specific charges, did not provide the occasion for him to examine the evidence against him, did not provide the opportunity for the preparation of a defense against the charges, did not allow the student to select an advisor, had denied him a hearing and the opportunity both to present evidence in his own behalf and to question witnesses, and did not prepare a report of the results for the student's inspection. While many schools accorded students some of these safeguards, rarely did a school guarantee so much deliberate due process.

This casual attention to procedure can be ascribed to the fact that until very recently, universities identified their relationship to students as being that of a surrogate parent. Probably first specified in *Gott v. Berea* in 1915, this theory had its clearest enunciation in 1925 by the California Supreme Court: "As to mental training, moral and physical discipline and welfare of pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose" (quoted in Van Alstyne 1968a, p. 292). While it is doubtful that the application of the *in loco parentis* theory to universities ever was a good analogy, it has escaped both logic and persistent efforts at its destruction.

Another pervasive assumption associated with the administration of student discipline was the view that attendance at a university, even a public one, was a privilege and not a right. Discipline procedures predicated on this assumption invited a more arbitrary attitude than would have been the case if matriculation were held to be a right if not a necessity.

The courts by generally not involving themselves have quite consistently indulged universities in the liberal exercise of discretion in disciplinary matters. Even as late as 1959, a federal court assumed a posture toward an expelled student seeking relief that reflected the position of courts 20 and even 30 years earlier. In *Steier v. New York State Education Commissioner*, the majority in the Court of Appeals for the Second Circuit held that Steier was entitled to no relief, that he had been admitted to college "not as a matter of right, but as a matter of grace after having agreed to conform to its rules and regulations" (quoted in Wright 1969, p. 1029). This is almost precisely the position of the court in *Anthony v. Syracuse University* (1928) when it said: "Attendance at the university is a privilege and not a right. In order to safeguard its scholarship and its moral atmosphere, the university reserves the right to request the withdrawal of any student whose presence is deemed detrimental. Specific charges may or may not accompany a request for withdrawal" (quoted in Van Alstyne 1963, p. 370).

Such gross indifference to the rights of students was not to characterize the developments in student discipline in the 1960s. Beginning with the Brown decision and the censure of Joseph McCarthy, both in 1954, America was to acquire a new consciousness as to its obligations in the broad areas of civil liberties and civil rights. The core of this new consciousness was the need to surround the individual with substantive safeguards. This need proved to be most pervasive —to the point of following the student onto the campus in order to guarantee the constitutional protections of his citizenship rights.

One of the first individuals in this era to call for the extension of this new consciousness and constitutional protection to the campus was Professor Warren A. Seavey of Harvard University. In 1957 he wrote: "It is shocking that the officials of the state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find the courts support them in denying the student protection given to a pickpocket" (Seavey 1957, p. 1407).

The *Dixon* Case

Before other sensitive representatives from the campus could echo Professor Seavey's indignation over the procedural sponginess of college discipline programs, the federal courts took the high initiative that they had maintained in civil rights matters since 1915 and that culminated in the 1954 Brown decision. In 1961 the Court of Appeals for the Fifth Circuit rendered one of those monumental decisions that was destined to be cited repeatedly for years to come. *Dixon v. Alabama State Board of Education* had an impact on student discipline of the same dimension as the Brown decision on school desegregation.

The *Dixon* case departed substantially from accepted doctrine and case law. "It discussed rules and cited cases from the field of administrative law" (Wilson 1970, p. 62?) and laid down a set of procedural demands reminiscent of those enunciated in *Hill v. McCauley* in 1887. In that year, the Court of Common Pleas of Cumberland County held that

> There need be no apprehension of such direful results from the declaration of the doctrine that the dismissal of students from colleges should be in accordance with those principles of justice . . . which are recognized as controlling in the determination of the rights of men in every civilized nation on the globe (quoted in Byse 1968, p. 140).

To be "in accordance with the principles of justice," this 19th century court insisted that a student whose conduct placed him in jeopardy of dismissal should be notified of the specific charges against him, have the testimony against him be given in his presence, be accorded the opportunity of cross-examination, and be allowed to call witnesses to support his defense.

While the principles and requirements outlined in *Hill v. McCauley* were largely ignored in subsequent cases, they were revived and vitalized in *Dixon*. Arising out of a sit-in demonstration involving students, the Fifth Circuit Court took the position that where severe penalties (suspension and expulsion) could be imposed, the following elements of due process should be observed:

1. A notice of specific charges.
2. A hearing which gives "an opportunity to hear both sides in considerable detail" and which preserves "the rudiments of an adversary proceeding."

3. The opportunity for the student to prepare and present "his own defense against the charges and to produce either oral testimony or written affidavits in his behalf."
4. Confrontation in cross-examination of adverse witnesses may not be required, but the student "should be given the names of witnesses against him and an oral or written report on the facts to which each witness testifies."
5. "The results and findings of the hearings should be presented in a report open to the student's inspection" (quoted in Van Alstyne 1963, p. 378).

In not requiring the opportunity for confrontation and cross-examination of adverse witnesses, the court in *Dixon* was not as exacting as the Court of Common Pleas had been in 1887. This could have been the occasion for some concern if the right of cross-examination is, as it has been described, "the greatest legal engine ever invented for the discovery of truth" (quoted in Johnson 1964, p. 353). Other due process questions were left unanswered by the *Dixon* case including "the right of counsel, a privilege against compulsory self-incrimination, the right to appellate review . . . , or the right to require an open hearing" (Project 1970, p. 766).

The fundamental significance of the Dixon case was not the enunciation of specific due process considerations, but the recognition that public colleges and universities are extensions of government and thereby come under the guarantees of the Fourteenth Amendment in the administration of student discipline. "Whenever a government body acts so as to injure an individual, the constitution requires that the act be consonant with due process of law" (quoted in Wright 1969, p. 1031). Subsequent cases could provide the clarification and enumeration not contained in *Dixon,* but the principle had been stated and "it had the force of an idea whose time had come" (Wright 1969, p. 1032).

It would be difficult to overemphasize the impact of the *Dixon* case. Its effects can be traced along at least three courses. First, it was destined to supersede older doctrine and to shape the course of future case law. Second, it was to stimulate considerable interests and wide commentary, particularly on the part of those associated with university law schools. This interest has led to the production of a considerable literature on the subject during the past decade—even to the launching in 1968 of a monthly publication, *College Law Bulletin.* Included in this substantive literature is a thorough reconsideration of the theoretical basis of the relationship of schools to students. Finally, the campus communities themselves have taken inventory of their student discipline systems looking to their refine-

ment and overhaul if necessary. Obviously, the occasion for these developments cannot be attributed exclusively to the *Dixon* case, but its influence must be acknowledged as fundamental.

The precedent-setting portent of *Dixon* was reflected in a decision of similar circumstance rendered four months later. *Knight v. Tennessee State Board of Education* cited *Dixon* in granting injunctive relief to students who had been summarily dismissed for their participation in a freedom ride. The basis for the relief was "to enforce their rights to procedural due process with respect to any disciplinary action growing out of their Mississippi convictions" (quoted in Chambers 1972, p. 217).

To date, no court has contradicted the position taken in the *Dixon* case but at least one court has enlarged on its analysis. In *Esteban v. Central Missouri State College*, 1967, the U.S. District Judge Elmo B. Hunter outlined some explicit prescriptions that should be followed in student discipline procedures:

1. Written charges ten days in advance of scheduled hearing.
2. Student's right to inspect in advance the college's pertinent affidavit or exhibits.
3. Student's right to call witnesses and introduce affidavits or exhibits.
4. Student's right to legal counsel.
5. Right to confrontation and cross-examination of witnesses.
6. Determination by the hearing bodies solely on evidence in the record.
7. Written findings and disposition.
8. Right of either adversary to make a *verbatim* record at his own expense.
9. Right of the student to appeal to the president of the institution, thence to the governing board (Chambers 1972, p. 219).

Outside the courtroom, the immediate reactions to *Dixon* and *Knight* were mixed. The American Civil Liberties Union and the American Association of University Professors pled with universities to be more restrained and use discretion in student discipline matters and suggested procedural safeguards universities should incorporate. In a speech given in 1962 at a conference of the National Association of Student Personnel Administrators, Clark Byse, a colleague of Warren Seavey in the Harvard Law School, greeted *Dixon* with obvious satisfaction. For Byse, *Dixon* met the test for creative decision making called for by Mr. Justice Cardoza in *The Nature of Judicial Process* and Roger J. Taynor of the California Supreme Court in his book, *The Law and Social Change in a Democratic Society*. Byse recognized that "concepts of due process and fair hearing are shaped in significant part by tradition, usage, and *stare decisis*" (Byse 1968, p. 150), but he also agreed enthusiastically with

Taynor in the view that "courts have a creative job to do when they find that a rule has lost touch with reality and should be abandoned or reformulated to meet new conditions and new moral values" (quoted in Byse 1968, p. 150). This is precisely what *Dixon* had done.

Byse predicted that the courts would enlarge on *Dixon* and that coming closer to the 1887 decision would require confrontation and cross-examination "in certain circumstances" (p. 151). More instructive for colleges and universities was the counsel of Byse that court intervention could be avoided if they would provide at least the procedural safeguards called for in *Dixon,* plus the right of counsel and the right of appellate review (pp. 153, 154).

Not all commentators greeted *Dixon* with satisfaction. Byse was appalled when he heard one seminar speaker say that "we are being trapped by a term 'due process'. It is just a matter of splitting hairs, it is a semantic bit" (p. 134). Richard O'Leary indicted Seavey, *Dixon, Knight* and Byse for flying in the face of precedent and solid tradition (O'Leary 1962, p. 439). O'Leary held there was "no need to redefine the relationship of college and university and its students nor [was] there any need to call for 'adversary' proceedings" (p. 451).

In 1963, a professor of law at Duke University, William W. Van Alstyne, launched what was to be a series of seminal articles focusing on the procedural due process aspects of student discipline. He was less than optimistic as to what might be expected of colleges and universities in making adequate provision for procedural safeguards. He had surveyed 72 state universities and found that 43 percent of them did not provide students with a specific statement of enjoined behavior, and over half of them did not provide students with statements of specific charges. This high degree of indifference to procedural guarantees was also reflected in responses to other questions (Van Alstyne 1963, p. 368).

Like Byse, Van Alstyne applauded the principles of *Dixon,* but his enthusiasm was tempered somewhat by the realization that the Supreme Court had yet to speak in a case bearing on due process and student discipline as well as the fact that *Dixon* was out of step with the "current condition of the law." However, Van Alstyne's expectation coincided with Byse's: *Dixon* would endure and be expanded upon (p. 380).

In the anticipation of aggressive action by the courts, Van Alstyne advanced three propositions he believed "encapsulated" procedural

due process as it should and would apply in relation to student discipline at a state university:

> 1. The degree of protection to which a student is entitled in the process of determining his guilt and punishment is in direct proportion to the harm which could result to him from such determinations. . . .
> 2. The extent of protection to which a student is entitled is inversely related to the harm which would result to others by providing such protection. . . .
> 3. Among alternative procedures which are reasonably equal in feasibility, the procedure offering the accused the greatest measure of protection must be followed (pp. 380-384).

Like Byse, Van Alstyne also became perscriptive as to what state colleges and universities should do in anticipation of the application of *Dixon*. The procedures outlined by Van Alstyne accepted the basic demands of *Dixon* and incorporated the additional elements suggested by the ACLU, AAUP, and Clark Byse, including notification of charges and possible penalties at least 10 days prior to any hearing, the right of counsel, and the requirement that the hearing be *de novo*, "without reference to any matter developed previously in an informal proceeding in which disciplinary action was considered"; also "no member of the hearing board who has previously participated in the particular case, or who would appear as a participant for the board itself, shall sit in judgment during that particular proceeding" (pp. 386, 387).

Van Alstyne was fully cognizant of the fact that his 1963 article gave only casual attention to the question of substantive due process. This question was to take on increasing significance as student concerns became more political in character and as the expression of those concerns moved into a community larger than the campus. The issue here is not only the fairness of the hearing, but the reasonableness of the rules, the alleged breach of which was the occasion of the hearing in the first place.

Rationale for Discipline Codes

Whatever the trend in case law, and there is every indication that it will follow the course set by *Dixon*, the focus of the literature on student discipline generated since the mid-sixties and of campus efforts to evaluate and reshape discipline systems has been on the character of the rationale for the system and on elements of due process. Invariably, the literature has been most insistent that the rationale for the discipline systems be predicated on the educational purpose or mission of the institution. Campus activity, looking to the generation or modification of discipline systems, has been shaped by that same predication.

Educational Purpose

In an article published in 1965, Thomas Brady laid down an intriguing, if not quite unexceptionable, principle: "We must be able to show that any reasonable man will be convinced that administration of discipline is a vital part of the educational process" (Brady 1965, p. 3). Unfortunately, Brady seems to have been unaware of the developments on the student discipline front following *Dixon*, and the system he espoused appears exceedingly anachronistic. His conception saw an intimate relationship among the means of higher education (the maturation and character development of students), the special competency of the faculty, and the role of discipline as a "form of teaching," therefore "at the heart of the educational process" (p. 10).

The difficulty with Brady's conception was its total disregard for due process. Discipline could be administered only by faculty, since only they could "determine with great accuracy . . . whether 'learning-readiness' [was] present or not" (p. 12). Discipline was to be conducted in an atmosphere that suggested none of the trappings of a court of law, hence in a "confidential and privileged manner" with "no rules and regulations," "no charges," and "no accusers" (pp. 3, 5, 14, 17). Brady found it "difficult to conceive a worse distortion of educational policy" than to respond to due process claims (p. 35). The point that Brady seemed to have overlooked was marked by Judge Sadler some 80 years earlier:

> The faculties of colleges are usually composed of exceptionally wise and good persons . . . , [but] the experience of mankind has long demonstrated

> the unwisdom of conferring absolute and irresponsible power upon any body of men, however estimable, except in extraordinary and unavoidable cases (quoted in Byse 1968, p. 141).

In a companion article to that of Brady, Leverne F. Snoxell was much more sensitive to the demand of due process. He was also able to reconcile these demands with the educational mission of colleges and universities. He asserted that "the standard of due process in student discipline proceedings that the courts will uphold is fundamental fairness or *fair play, and reasonable rules reasonably applied*" (Snoxell 1965, p. 33).

Subsequent commentaries sharpened the argument in defense of some form of campus discipline, maintaining as a benchmark the constant reminder that any system must be closely related to the aims, goals, purposes, or values of the educational process. Departing from Brady, most recent literature has placed less stress on character development and more on the effective management of complex institutions, the effectiveness of which could be seriously eroded by the untoward intrusion by the courts. In 1968, Van Alstyne was apprehensive lest unenlightened educational policy invite "unwelcome litigation" (Van Alstyne 1968a, p. 304).

The necessary connection between any disciplinary regulation and its educational purpose has been stated quite persuasively by Phillip Monypenny: "The need of a body of regulations for the very tightly-packed, constantly interacting populations on any university campus is undisputed. What can be disputed is what purposes should govern the regulations and how they should be made and applied" (Monypenny 1967, p. 742). Monypenny had little difficulty with regulations that govern such issues as safety and the management of public events. But he felt that delicate policy questions emerge as regulations are designed to extend control over more private behavior (p. 743). Hopefully, the design of these regulations would be governed by some principles of reasonableness and fairness. "If the agencies of education act justly, and seem to act justly, the courts will find very few occasions to impose a judicially-developed view of justice on them" (Monypenny 1968, p. 657).

The common denominator of recent literature seems to consist in the view that enlightened educational policy will attempt to strike a balance between providing protection for the achievement of personal freedom and the articulation of regulations appropriate to the function of a special social organization. The burden of that balance should carry high sensitivity to the legal limitations on the regula-

tions, but more particularly to the values that inform academic purpose—to "the ends to be achieved in the educational program" (Monypenny 1968, p. 662).

In 1968, a special issue of the *Denver Law Journal* was devoted to the "legal aspects of student-institutional relationship." It was the hope of those who put the special issue together that higher education would give sufficient attention to the academic purpose behind institutional regulations that "the law can be developed in the light of educational objectives" (*Denver Law Journal* 1968, p. 497). This expression of hope was an invitation for leadership in matters of student discipline to remain on campus and not devolve upon the courts. For Robert McKay, one of the contributors to the special issue, a minimum guarantee in that hope would be a limitation on university discipline "to student misconduct which distinctly and adversely affects the university community's pursuit of its proper educational purposes" (McKay 1968, p. 560).

Even though the theme of the special issue of the *Denver Law Journal* was the development of the law in relation to academic ends, another contributor to that issue counseled in a noncontradictory manner that close attention to the development of law could in turn be instructive in the determination of educational policy:

> The possible value of law, in helping to shape solutions and in providing useful lessons drawn from experience in parallel social situations, arises from its age-long concern with the defining of relationships in a wide variety of individual and associated contexts, its adaptations to changes through the redefining of relationships, its handling of troublesome cases, and its concern for both the maintenance and proper exercise of legitimate authority (Beaney 1968, p. 512).

Articles written since the special issue of the *Denver Law Journal* have essentially refined the concept that there should be a balance between the limitations demanded by the constitution and law on the one hand and institutional needs and integrity on the other. In a lengthy but most valuable article, Charles Alan Wright gave the opinion in 1969 that in attempting to strike that balance a university could avoid obsession with legal limitations by granting more than is required: "A wise university may well make a prudential judgment that it ought to give its students greater freedom or more procedural protections than the constitution demands of it" (Wright 1969, p. 1035).

In 1970, the American Bar Association issued the *Report of the Commission on Campus Government and Student Dissent*. It upheld

the dictum of those who had taken the position that a student discipline system should be characterized by reasonableness and fairness, but it also added a dimension that had been somewhat neglected by earlier writers. The Commission report asserted that disciplinary proceedings should also be *effective*, meaning simply that the procedures should accomplish the objectives for which they were created. This in turn calls for a "widely shared commitment" (American Bar Association 1970, p. 26). This position was echoed by the Carnegie Commission on Higher Education in 1971. In a special report on dissent and disruption it affirmed the position that for campus disciplinary procedures to be effective, there must be "acceptance" of them by the campus community (Carnegie Commission on Higher Education 1971a, p. 93). The Commission also cautioned against the adoption of "complex judicial procedures" that could be inimical to values long associated with academe: "tolerance . . . example and persuasion," and "a spirit of collegiality" (p. 94), positions consistent with Wright's appeal to grant greater freedom and more protection than required by law.

Most of the recent commentaries confine the meaning of effectiveness to acceptance of the campus disciplinary system. However, in his introduction to *Law and Discipline on Campus*, Robben W. Fleming extends the terms to include the role of law as well: "Actually, the capacity of external law or the internal disciplinary system to meet a situation effectively is in large degree dependent on whether the constituency to which it applies accepts it" (Fleming 1971, p. 1).

Paralleling and often anticipating the substance of the evolving literature on discipline systems, there has been an almost frenetic effort on American campuses to rethink and justify student codes in relation to educational objectives. A review of many codes of student conduct, developed over the last half dozen years, reveals a high order of sensitivity to the need for a stated purpose or rationale to shape the development and accompany the promulgation of any student discipline system.

In a 1970 survey of one hundred baccalaureate-granting institutions, a doctoral candidate at Michigan State University found that codes of student conduct were justified on the basis of institutional purpose or the "need to create and maintain a living, social and campus environment which allows the greatest possible freedom to learn" (Christiansen 1970, p. 78). A similar survey conducted by the author in 1968 pointed up the tendency of higher education institutions to

justify the regulation of student behavior in terms of the purposes or interests of the institution (Cazier 1970, pp. 509-515). Supposedly only that behavior was censured that was inimical to those interests and purposes.

> Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted ("Joint Statement on Rights and Freedoms of Students" 1967, p. 365).
>
> The whole process of discipline is meaningful only when it is relevant to the generic functions and purposes of the university ("Report of the Senate Committee on Student Affairs on Discipline Procedures and Policy," University of Colorado 1968).
>
> There shall be no regulation unless there is a demonstrable need for it which is reasonably related to the basic purposes and necessities of the universities as stipulated herein ("Academic Freedom for Students at Michigan State University" 1967).

Those interests and purposes are generally related to maintaining an atmosphere conducive to the life of the mind, to the advancement of knowledge, the development of students, and appropriate public service. Sometimes, however, universities have difficulty determining their educational objectives or processes. Two commission studies at the University of Wisconsin came to contradictory conclusions during the spring of 1968. One study called for sanctions against "intentional conduct" that impaired "a significant university function or process" ("Report of the Ad Hoc Committee on the Role of Students in the Government of the University," February 6, 1968). The other study sought to confine the university's application of sanctions to "its *academic* [emphasis added] relationship with its students" ("Report of Ad Hoc Committee on Modes of Response to Obstruction, Interview Policy, and Related Matters," April 25, 1968).

Basis for Authority

Most rationales for student discipline systems generally allude to the university's source for authority if only to its theoretical basis. The location of that authority has gone through an interesting evolution since the enunciation of *Dixon*.

The poverty of the *in loco parentis* theory, which had served in yesteryear to describe the basic institutional-student relationship, became more pointed with the development of the new direction in case law and commentary in connection with student discipline. Attending such a radical shift in position would be an inevitable

scrutinizing of the theoretical basis of student discipline. In *Dixon* there was no reference to *in loco parentis* and no acknowledgment of its prior currency. Van Alstyne attacked the quality of the surrogate parent analogy in 1963 in saying that the power of parents in relation to children was "more restricted" than that exercised by many universities in disciplining students, that universities could seldom cultivate a climate of intimacy which parents enjoyed with children, that it was not the intention of parents to entrust universities with surrogate authority, and considering the average age of college students today, they could hardly be construed as "legal infants" (Van Alstyne 1963, pp. 370, 375, 376). By 1967, the court in *Goldberg v. Regents of University of California* could say without analysis that "for constitutional purposes, the better approach, as indicated in *Dixon*, recognizes that state universities should no longer stand *in loco parentis* in relation to their students" (quoted in Van Alstyne 1968a, p. 292).

The obvious question then is, in what relation to students do universities stand? A popular competitor of *in loco parentis* is the theory of *ex contractu*. Simply stated, the contract theory calls for the university to agree to provide certain services and for the student in some instances to agree to pay for part of those services and in all cases to abide by the rules and regulations of the university. A turn-of-the-century decision, *Goldstein v. New York University*, states the theory as follows:

> The relation[ship] existing between the university and student is contractual. . . . There is implied in such contract a term or condition that the student will not be guilty of such misconduct as would be subversive of the discipline of the college or school or as would show him to be morally unfit to be continued as a member thereof (quoted in O'Leary 1962, p. 440).

Some sixty years later, Richard E. O'Leary wrote rather categorically that the "weight of authority" viewed the university-student relationship as contractual. "This relationship has not been uniformly defined by the courts, but a review of the language used in the decisions dealing with student discipline seems to permit the conclusion that one definition is today acknowledged—contractual" (O'Leary 1962, p. 438). Furthermore, O'Leary insisted that the authority of universities "to set the terms of the contract with regard to regulations" was "unchallenged" (p. 441).

The standard difficulty in employing the contract notion to describe the university-student relationship is that the notion is so easily shorn of the mutuality and capacity for bargaining implied in the character and processing of a contract.

> The rules which a student 'contracts' to observe are all together non-negotiable, and there is in fact an absence of bargaining. The majority of 'sellers' uniformly employ a self-serving clause reserving the right to terminate the relation at will according to standards they unilaterally determine pursuant to a vague 'good' rule. Thus, the negotiability of terms is compounded by the real lack of shopping alternatives, the inequality of the parties in fixing terms, parallel practices among sellers, and the impotency of individual applicants to effect terms. The contracts are purely on a take-it-or-leave-it basis (Van Alstyne 1968b, p. 584).

> Unlike the courts, most scholars who have considered the subject agree that the contract theory, as it has been applied, is inappropriate for the student-university relationship. The student should not be bound by terms buried within school catalogs, applications, or registration forms, which he would not reasonably have been expected to read carefully. . . . And because there is no bargaining—the school dictates the terms of the contract (Project 1970, p. 804).

In 1957, Warren A. Seavey suggested that the most appropriate vehicle for containing the university-student relationship was the fiduciary concept.

> A fiduciary is one whose function it is to act for the benefit of another as to matters relevant to the relation between them. Since schools exist primarily for the education of their students, it is obvious that professors and administrators act in a fiduciary capacity with reference to the students. One of the duties of the fiduciary is to make full disclosure of all relevant facts in the transaction between them. . . . The dismissal of a student comes within this rule (p. 1407).

Seavey's suggestion pricked the interest of Alvin L. Goldman, who elaborated on it in a 1966 article. Goldman rejected *in loco parentis* for many of the reasons already given. He also felt that the contract theory was inappropriate since "contract rules were developed to deal with the hard-bargains made by self-interested persons operating in a commercial setting" (1966, p. 650). The appeal of the fiduciary approach was that it seemed to project the university-student relationship with more accuracy and yet with greater possibilities than other concepts. For Goldman, it was a "conceptual relationship" that marked the proper location of responsibility and allowed for mutual understanding as to the burden of responsibility. Trust and confidence, of course, are basic to human relationships predicated on the fiduciary concept, but if the university is to act as fiduciary in disciplinary matters, it has the obligation of assuring that any action taken:

> (a) was reasonably imposed for cause consistent with its function of maintaining an open-minded atmosphere conducive to the acquisition and use of tools for freely inquiring into and exploring ideas; and

(b) was imposed in a manner consistent with scholarly integrity and fair processes. In addition, as a fiduciary, the university ought to afford the student every opportunity and means of rehabilitation (p. 670).

Van Alstyne seconded Goldman and hoped the courts in reviewing the decisions of trustees and university officials would reject the contract theory in deference to "the high standards of fiduciary obligation" (Van Alstyne 1968b, p. 584). The *Duke Law Journal* Project also accepted the stipulations of Goldman, that the university as fiduciary "would have the burden of showing that any disciplinary action imposed was both reasonable and necessary in light of the university's function and that the disciplinary sanctions were imposed only after a fair and just proceeding" (1970, p. 806).

What may be distinguished as a fourth possible source of authority is the "inherent" or "implied" power of the university. *Goldberg v. Regents of the University of California*, which was just cited in a denial of the further applicability of *in loco parentis*, also took the position that a university's "disciplinary action was a proper exercise of its *inherent* [emphasis added] general powers to maintain order on the campus and to exclude therefrom those who are detrimental to its well-being" (quoted in Chambers 1972, p. 145).

Douglas Wilson has suggested that even in the past, when *in loco parentis* was invoked to assert school authority, many schools were in fact relying upon "expressed or implied authority in state constitutions and statutes" (Wilson 1970, p. 620). For Wilson, the importance of the distinction consisted in the view that constitutional limitations would likely have applied with more force had it been clearly understood that some schools were relying on an authority other than that derived from "a private law concept" (p. 620).

Herman Edward Harms sees the distinction as being less real or significant than Wilson. Harms takes the position that what "appears to be a recognition of the inherent right of educational institutions to . . . enforce reasonable regulations" may be little more than an extension of *in loco parentis* through a "semantic change in definition" (Harms 1970, p. 19).

Monypenny would also soften the distinction between *in loco parentis* and the fiduciary principle. In particular, he feels that Goldman's approach to the fiduciary theory can be traced in part to *in loco parentis*.

That doctrine asserted not only an authority over the student but an obligation to him; it was justified by the need to protect him against his

> own immaturity. It is a status conception, an obligation in hearing in a relationship not derived from, nor more than partially modifiable by, the specific terms of a contract (Monypenny 1968, p. 652).

There appears then to be a residue of *in loco parentis* not exhausted by the negative connotations generally associated with its familial or paternalistic character. Students are often more than nostalgic as they unconsciously or indirectly invoke the principle: "Many students, even though they vigorously deplore a familial characterization in the abstract, want support and sympathetic treatment when they are involved in a concrete case" (Heyman 1966, p. 75). McKay concurs with this observation. He affirms that students do desire to escape the more paternal aspects associated with the exercise of university authority. "However, it is less clear that they want a completely arm's-length relationship in which the university would no longer provide academic sanctuary for youthful excesses for which the outside community might otherwise exact its pound of retribution" (McKay 1968, p. 558).

If it can be assumed that there has been a demise of *in loco parentis* as a negative sanction of student behavior, the principle may be emerging as a benign, if ironic, source of university authority and obligation—as an appeal for student development as a total university concern. This new expression of university responsibility is also related to broader and sometimes competing demands on the part of students. They want fewer controls, but more support for their personal concerns. It is important to note that there is a high degree of delivery on those demands. Due process considerations are tempering the controls, and the concerns are being addressed, if not satisfied, in "areas of housing, food services, loans, scholarships, tuition aid, work-study programs, employment, physical and mental health, population control, recreation, guidance, and placement service" (Harms 1970, p. 23).

The emergence of *in loco parentis* in a more benign form reflects discussion bearing on the very nature of the university and its manifold functions. In 1972, the Carnegie Commission on Higher Education reported that a broad survey of students and faculty indicated a strong feeling that American higher education could be improved if it would show more concern for "the emotional growth" of students (Carnegie Commission on Higher Education 1972, p. 76). The Commission did not have an immediate response to this concern since it did represent a departure from what had been associated with the more traditional purposes of higher education, purposes

essentially cognitive and occupational in orientation. Although the report, *Reform on Campus: Changing Students, Changing Academic Programs,* was tackling some large issues, the best the Commission could muster on the "emotion growth" of students was the simple caveat that "we know too little about the 'developmental' aspects of higher education to make recommendations adequate to the problem" (p. 6).

Within a year, however, the Commission was prepared with some recommendations on the "developmental" responsibilities of higher education. In a report entitled *The Purposes and the Performance of Higher Education in the United States: Approaching the Year 2000,* it concluded that even in benign form, *in loco parentis* was inappropriate to the purposes and functions of higher education: "the campus . . . having given up the old *in loco parentis* should not now try to stand *in loco discipuli*" (1973, p. 18). While the campus has the responsibility for creating as "constructive" an environment as possible, particularly for the "intellectual" and "occupational" development of students, it "cannot and should not try to take direct responsibility for the 'total' development of the student. That responsibility belongs primarily to the individual student by the time he goes to college" (1973, p. 16).

In the years ahead, considerable debate will likely ensue over the university's responsibility for the "total" development of students, but few will quarrel with the Carnegie Commission's insistence that the campus has an obligation for creating a "constructive" environment—an environment that at the very minimum facilitates primarily student-initiated development. Although we have been momentarily preoccupied with basic purposes of higher education, attention hardly need be drawn to the relationship between the quality of a campus environment and the character of the disciplinary system on that campus. Hopefully, the latter would play a subordinate but supportive role in the "development" of students. While giving students considerable credit for determining the atmosphere of any campus, Phillip Monypenny has pointed to the conditioning effects of disciplinary rules: "If the areas of explicit disciplinary restriction are kept as narrow and as clearly defined as possible, a collaborative development of the character of the university and of its student body will have a better chance to take place" (Monypenny 1968, p. 745).

Substantive Due Process

The issues being addressed here bear directly on the question of substantive due process or the nature of activities coming within the proper purview of a code statement. The expanded arena of student concern, including political expression off-campus and recent court actions, have narrowed the range of activities that may be regulated as a function of university prerogative. Clearly, the thrust of these developments is in the direction of emphasis on the rights of students, more precision of language as to their responsibilities, and, in general, greater freedom of expression and action.

General Parameters

A variety of court cases have set the parameters within which substantive due process should be protected on any campus. It is interesting to note that there has not been a significant departure from Laverne Snoxell's 1965 summary statement, cited earlier: "The standard of due process . . . that the courts will uphold is *fundamental fairness or fair play, and reasonable rules reasonably applied*" (1965, p. 33). The implication is quite clear: the courts will not intercede in the disciplining of students, if the rules, which are the occasion for the disciplinary action, are not arbitrary. Wilson has stated the issue quite succinctly: "Regulation can always involve the issue of substantive due process: whether a regulation is reasonably regulated to a valid object of the state's power" (1970, p. 627). Applying this principle to the campus environment, the Missouri District Courts accepted the standard developed by William Van Alstyne. The courts held that "in the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution" (quoted in Drucker 1971, p. 479).

Colleges and universities should also appreciate the fact that they cannot now predicate the granting of any privilege or right to students on their waiver of constitutional protections. Summarizing the trend in case law since 1965, M. M. Chambers has noted that "most prominent of all has been judicial recognition, in federal and state courts, that the freedom accorded to, and the restraints imposed upon, college and university students are to be measured by the Bill of Rights in the United States Constitution" (Chambers 1972, Introduction).

Student Bill of Rights

In the last half-dozen years, there has been a concerted effort to establish the rights of students with as much clarity as has formerly illuminated their responsibilities. A model statement of the rights of students was developed by the National Student Association and the American Association of University Professors and was endorsed by a number of other national associations in 1967. The joint statement enumerated the following "Rights and Freedoms" (American Association of University Professors et al., 1967, p. 365):

I. FREEDOM OF ACCESS TO HIGHER EDUCATION
II. IN THE CLASSROOM
  A. Protection of the Freedom of Expression
  B. Protection Against Improper Academic Evaluation
  C. Protection Against Improper Disclosure
III. (CONFIDENTIALITY OF) STUDENT RECORDS
IV. STUDENT AFFAIRS
  A. Freedom of Association
  B. Freedom of Inquiry and Expression
  C. Student Participation in Institutional Government
  D. Student Publications
V. OFF-CAMPUS FREEDOM OF STUDENTS
VI. PROCEDURAL STANDARDS IN DISCIPLINARY PROCEEDINGS

The author's 1968 survey identified a trend of incorporating a student "bill of rights" in new or modified student disciplinary systems (Cazier 1970, p. 515). Christenson's 1970 survey documented the disposition of campuses to affirm that students have rights as well as responsibilities (1970, p. 95). Finally, the Carnegie Commission on Higher Education recommended in its 1971 report on dissent and disruption the adoption of a "bill of rights" for students (Christenson 1971, p. 2).

Specificity of Disciplinary Rules

In reviewing and redrafting code statements, campuses have consistently moved in the direction of a more precise delineation of the behavior to be enjoined or circumscribed by the regulations. An illustration of this is found in the 1968 modification of the "Policies Relating to Students" at the University of California. The 1966 version of the policies is a rather general code statement. President Hitch stated that he and the chancellors of the nine campuses hoped that the 1968 version would "define more precisely the meaning of standards of conduct" and that the revision was "a clarification rather than a change of university policy" ("University of California Policies Relating to Students and Student Organizations, Use of University

Facilities, and Non-Discrimination," July 1, 1966, and February 19, 1968). Certainly the behavior prescribed in the later version leaves less to the imagination of the student:

> a. Dishonesty, such as cheating, plagiarism, or knowingly furnishing false information to the University;
> b. Forgery, alteration, or misuse of University documents, records, or identification;
> c. Obstruction or disruption of teaching, research, administration, disciplinary procedures, or other University activities, including its public service functions, or of other authorized activities on University premises;
> d. Physical abuse of any person on University-owned or -controlled property or at University-sponsored or -supervised functions, or conduct which threatens or endangers the health or safety of any such person;
> e. Theft or damage to property of the University or of a member of the University community or campus visitor;
> f. Unauthorized entry to or use of University facilities;
> g. Violation of University policies or of campus regulations, including campus regulations concerning the registration of student organizations, the use of University facilities, or the time, place, and manner of public expression;
> h. Use, possession, or distribution of narcotic or dangerous drugs, such as marijuana and lysergic acid diethylamide (LSD), except as expressly permitted by law;
> i. Violation of rules governing residence in University-owned or -controlled property;
> j. Disorderly conduct or lewd, indecent, or obscene conduct or expression on University-owned or -controlled property or at University-sponsored or -supervised functions;
> k. Failure to comply with directions of University officials acting in the performance of their duties; or
> l. Conduct which adversely affects the student's suitability as a member of the academic community.

Some school administrators are concerned that the demand for specificity will erode their discretionary authority, but according to the Fact Finding Commission on Columbia Disturbances it is worth the price: "The undeniable value of administrative flexibility may be purchased only at the overriding cost of an unclarity, which opens an administration to charges of arbitrariness on the one hand, or weakness on the other, and thus may cost it the moral support that milder and more explicit forms of regulation might enjoy" ("Report of the Fact Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May 1968, 1968," p. 71).

Earlier commentaries on student discipline systems called for more generalized code statements. This was the position of Brady as late as 1965, a position that U. S. District Judge Elmo B. Hunter cited with approval in an important case in 1967 (*Esteban v. Central*

Missouri State College 1967, p. 622). However, the "Joint Statement" held that regulations should be sufficiently specific to leave little doubt in the minds of students as to when they were in breach of the regulations. Wright strongly concurs with this view: "I think it no overstatement to say that the single most important principle in applying the Constitution on the campus should be that discipline cannot be administered on the basis of vague and imprecise rules" (1969, p. 1065).

It is somewhat ironic that the American Bar Association may have been guilty of the vagueness and imprecision that Wright had hoped campuses would avoid. The Association's Commission on Campus Government and Student Dissent took the position that it was "not inclined to recommend either that a university may never act against a student other than pursuant to a published rule clearly furnishing the basis for a specific charge or that it may freely act against the student even in the absence of any clearly applicable and previously published rule" (American Bar Association 1970, p. 21). The equivocation of the American Bar Association reflects the fact that the specificity of the disciplinary code has been a matter of dispute in the courts. In *Soglin v. Kauffman,* the court of Appeals for the Seventh Circuit affirmed the judgment of District Judge James E. Doyle in favor of the explicit regulations. On the other hand, in *Esteban v. Central Missouri State College,* the majority of the Court of Appeals for the Eighth Circuit upheld the position of District Judge Elmo B. Hunter that general rules should be adopted in higher education. M. M. Chambers devotes a short chapter to a clear delineation of the dispute between the Seventh and Eighth Circuits over the issue of generality versus specificity (Chambers 1972, pp. 247-255).

In a technical but rewarding article, Christine M. Drucker has analyzed the review of *Esteban* by the Court of Appeals for the Eighth Circuit (1971, pp. 467-490). In her article, Drucker addressed procedural questions but confined the bulk of her analysis to the specificity aspect of substantive due process. She found *Esteban* defective on both procedural and substantive grounds and thus a "step backward rather than a move forward in adapting legal theory to the novel, yet challenging academic community of today" (Drucker 1971, p. 489). On the question of specificity, Drucker expressed the view that:

> The most constructive and feasible approach is that taken in *Sword v. Fox,* where school regulations were judged by the same criteria applied to other

> statutes. . . . 1) to provide persons with adequate notice of what is forbidden, and 2) to prevent infringement of their rights because of rules which are drafted so broadly that any kind of interpretation can be placed upon the regulation. Students are no less deserving of these considerations than any other segment of the population, nor is the punishment any less real. This should be the overriding concern of the courts, but they have yet to take full cognizance of their role (Drucker 1971, p. 486).

Nor did the courts take full cognizance of the role as suggested by *Sword v. Fox*. Drucker's article was published in the spring of 1971, but the position taken in *Sword v. Fox* was reversed in the Fourth Circuit Court of Appeals in July 1971. The dispute over specificity continues.

Freedom of Expression and Assembly

Sword v. Fox not only has significant bearing on the specificity aspect of campus regulations, but also on the exercise of First Amendment rights. Of the elements following under substantive due process none has received more attention and none is more important in a university community than those associated with the exercise of First Amendment rights, especially freedom of expression and assembly. The burden of the report on *Dissent and Disruption* was to distinguish between the two and to affirm protection for the former, while denying it to the latter.

> Dissent is essential to democratic life. It generates new ideas, propogates their acceptance or exposes them to rejection, and evaluates their effectiveness if put into practice. Dissent lies at the foundation of a university; to create the factual and analytical groundwork necessary for critical assessment of ideas and actions is a major goal of education. . . .
>
> Disruption, on the other hand, is utterly contradictory to the values and purposes of a campus, and to the processes of a democratic society. Disruption is contrary to an atmosphere conducive to the rational assessment of problems and the constructive consideration of alternative solutions (Carnegie Commission on Higher Education 1971, pp. 11-12).

The literature has rather substantially supported the position that all legitimate university functions should enjoy protection from disruption or interference. One ad hoc committee at the University of Wisconsin would extend protection only to the university's "*academic* [emphasis added] relationship with its students" ("Report of Ad Hoc Committee on Modes of Response to Obstruction, Interview Policy, and Related Matters," April 25, 1968). The much more widely accepted position, however, is the one summarized by McKay: "In the university context, the protected activities include not only

classes, libraries, and public meetings, but also normal administrative functions and such service-related activities as health services, recreational activities, and on-campus recruitment" (McKay 1968, p. 567).

Obviously a university should not tolerate injury or abuse to persons or damage to property, but in addition it is not prohibited by the First Amendment from enjoining expression or action that denies access to buildings, creates a captive audience situation, or in any substantial manner abridges the rights of others. But beyond this, the university may be invited to exercise "patient forbearance" regarding modes and substance of expression (Fortas 1968, p. 47). The Supreme Court spoke clearly to the issue in *Tinker v. Des Moines Independent Community School District:*

> Any word spoken in class, in the lunchroom, or on the campus, that deviates from the views of another person, may start an argument or cause a disturbance. But our Constitution says we must take the risk. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views . . . but conduct by the student in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized (quoted in Wilson 1970, p. 631).

If protection from interference and disruption is accorded to all legitimate university functions, it is incumbent then on the university to protect the broadest range of expression, either by individuals or groups. Van Alstyne has prescribed as a general rule that constraints imposed by the university be confined to those which "a. forbid modes of conduct that are manifestly unreasonable in terms of time, place or manner; b. forbid incitements made under such circumstances as to create a clear and present danger of precipitating a serious violation of the law" (Van Alstyne 1968a, p. 298). Van Alstyne amplified this general rule by suggesting there are "neutral priorities" which a university may consult in the allocation of its facilities to invited speakers, such as giving a higher priority to a regularly scheduled academic enterprise or university event (Van Alstyne 1968a, p. 301). In further elucidation of the general rule, Wright has stated that "the nature of the university, and the pattern of its normal activities dictate the kinds of regulation of time, place, and manner that are reasonable, but the First Amendment is no bar to reasonable regulations of that kind" (Wright 1969, p. 1042).

Allowing for the establishment of reasonable regulations of the kind indicated, the university and larger public communities may be

surprised to learn of the breadth of freedom that now attends expression and assembly on the American campus as a result of litigation. Five years ago Van Alstyne could write:

> On-campus bans against guest speakers have been enjoined where the rule supporting the ban was so vague as to reserve carte blanche censorship to the administration and where the university classified speakers as acceptable or unacceptable in terms of their political affiliation, their unrelated conduct before Congressional committees, or their having been subject to an unadjudicated criminal charge—even one of murder or homosexual soliciting. Where no physical disorder is imminent, where there is no substantial basis for supposing that the speaker will himself violate the law or incite others to a violation in the course of his remarks, where the facilities are otherwise available and other guest speakers are generally allowed on campus, the student residents interested in hearing a given speaker on campus may not be denied (Van Alstyne 1968b, p. 587).

A year later Wright's litany was even more pointed:

> A speaker cannot be refused permission to speak on campus because he has been convicted of a felony or is under indictment for murder, or because he urges or advocates violation of the laws, or because he is an admitted member of the Communist Party. A speaker may not be required to promise that he will not use his speech to publicize the activities of any 'subversive, seditious, and un-American organization.' A forum cannot constitutionally be denied 'subversive elements' nor even to groups seeking to overthrow the government by force or violence (Wright 1969, p. 1051).

One might be inclined to conclude from this litany that practically every form of speech is permitted on campus. Paraphrasing a thoughtful observation from Thomas I. Emerson's book, *Toward a General Theory of the First Amendment,* Wright cautions us that this is not the case:

> There are words that are not regarded as obscene, in the constitutional sense, that nevertheless need not be permitted in every context . . . if a shock effect is produced by forcing offensive language upon a person contrary to his wishes, the harm is direct, immediate, and not controllable by regulating subsequent action. Realistically it can be considered an "assault" on the other person and dealt with as action rather than expression (Emerson 1969, p. 1058).

In his 1968 General Rules Statement, Van Alstyne had indicated that a university could forbid expression that created "a clear and present danger of precipitating a serious violation of law" (Van Alstyne 1968a, p. 298). A variation of that restriction appeared in *Stacy v. Williams,* a 1969 Federal case. The Court held that a proposed speech could be denied if it represented "a clear and present danger to the institution's orderly operation" (quoted in Chambers 1972, p.

177). The restriction appears broader than one confined to "a serious violation of law," but in defining those "actions" that would presumably follow a course of "advocacy," thus impairing the "institution's orderly operation," the Court did not identify any action that also would not be "a serious violation of law."

While recent litigation relating to freedom of expression and assembly on campus has been motivated by the high principle of protecting the exercise of First Amendment rights, litigation has not resulted in freeing students, faculty, and invited speakers from their citizenship accountability to the law. The American Bar Association has concluded that "the university is entitled to reflect these constraints in its own regulations. Accordingly, willful defamation, public obscenity, certain incitements to crime, as well as other civil or criminal misconduct under laws applicable to a manner of speech or assembly directly damaging to the rights of others may be subject to institutional redress" (American Bar Association 1970, p. 12).

Other Elements of Substantive Due Process

While freedom of expression and assembly may be the most important element of substantive due process relating to the campus environment, there are several others that deserve at least limited comment. Among them are freedom of the student press, freedom of association, confidentiality of student records, and the application of the Fourth Amendment to dormitory rooms. At least the first two of these additional elements are also directly related to First Amendment rights.

The freedom enjoyed by the student press falls essentially under the same rubrics that govern any expression on campus, including time, place, and manner regulations. "Valid general laws proscribing willful defamation, public obscenity, and other actionable wrongs apply equally to printed matter as to other forms of expression on campus" (American Bar Association 1970, p. 14). By extension, the only additional controls the university may exercise are those reasonably tied to potential liability. For example, the university may require the student press to indicate it does not speak for the university per se.

On many campuses, a very constructive programmatic relationship exists between student publications and academic units. However, the relationship can exist only when it is not burdened with suggestions of censorship. The courts have been quite willing to speak out against instances of censorship of student publications.

In one of the more interesting cases, *Antonelli v. Hammond,* the editor of a student newspaper asked the U. S. District Court for an injunction against a college president. The Court did not grant the injunction, but District Judge Garrity did lecture on the proper limits to press controls:

> We are well beyond the belief that any manner of State regulation is permissible simply because it involves an activity which is part of the university structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters. Thus, in cases concerning school supported publications or the use of school facilities, the courts have refused to recognize as permissible any regulations infringing free speech when not shown to be necessarily related to the maintenance of order and discipline within the educational process (quoted in O'Hara and Hill 1972, pp. 86-87).

A common concern of campus administrators in recent years has been freedom of association along with the apprehension that some student associations affiliated with extramural organizations were contaminated, if not actually controlled by the affiliation. While that apprehension has not been a sufficient basis for denying recognition to the associations and their use of campus facilities, "reasonable provision may be made to safeguard the autonomy of the campus organization from domination by outside groups. . . ." Furthermore, "violation of such rules by voluntary association may properly result in the imposition of sanctions against an association corporately, and not merely against its members as individuals" (American Bar Association 1970, pp. 11-12).

Among voluntary student organizations, Students for a Democratic Society (SDS) has probably been the *cause célèbre* in focusing the apprehension of campus administrators. Certainly, SDS has generated its share of court attention, including that of the Supreme Court in a precedent setting case, *Healy v. James.*

In 1969, some students at Central Connecticut State College petitioned the administration for recognition of a local chapter of SDS. While the Student Personnel Committee, by a vote of 6-2, recommended to President James that he grant recognition, he rejected the recommendation on the same grounds that had given the Student Affairs Committee some concern, that is, the relationship between the proposed chapter and the national SDS organization.

The affected students sought relief in the Federal District Court. Retaining jurisdiction in the case, the Court ordered that a hearing on the issue be held on campus. The hearing was held, but it did

not satisfy the misgivings of President James and he reaffirmed his denial of recognition. Subsequently, the District Court dismissed the case. It was appealed to the United States Circuit Court of Appeals, where the judgment of the District Court was affirmed by a 2-1 vote. On further appeal, the Supreme Court in 1972 granted certiorari and by unanimous action reversed the lower courts. In delivering the opinion for the court, Associate Justice Powell provided several reasons for the reversal:

> State colleges and universities are not conclaves immune from the sweep of the First Amendment. . . . While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition. . . . The effect of the college's denial of recognition was a form of prior restraint. . . . The court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition (quoted in O'Hara and Hill 1972, pp. 192-195).

Consistent with prior court action, the Supreme Court in this case distinguished between protected expression and action that did not fall under First Amendment rights. The University could deny recognition and participation to a student organization if it refused to abide by "any valid campus rules" (quoted in O'Hara and Hill 1972, p. 197). This judgment was anticipated two years earlier in *Lieberman v. Marshall:*

> When the interest of SDS members in seizing a part of a campus building in open defiance of known university regulations is balanced against the need of the university to maintain order and respect for fair rules, and its need to pursue educational goals without undue disturbance, it is apparent that the equities clearly lie with the university and that the activities of SDS and its members fell beyond the limits of protected speech (quoted in Chambers 1972, p. 188).

The 1967 "Joint Statement on Rights and Freedom of Students" highlighted a principle that has become a matter of some concern in recent years—the confidentiality of student records. Who has access to what documents and under what circumstances emerged as a special issue during the period of student unrest precisely because an array of individuals and agencies, public and private, began putting demands on institutions for the compilation and release of information on students—information that was often very sensitive in nature. Not infrequently a profile on an individual's political ideology, social values, and organizational affiliations was requested. The request

was not always accompanied by a clear indication of the purposes to which the information would be directed.

When the Joint Statement heightened this concern, there were few laws or court cases on which a campus could build standards of confidentiality. To the imaginative campus or association, such a situation presented an opportunity, one often lost on higher education. Fortunately, the American Council on Education responded to the challenge with a "Statement on Confidentiality of Records. . . ." This statement called on each campus to be sensitive to the need for a "relationship of confidentiality" between itself and its students and to develop policies to cover that relationship. In developing those policies, campuses were cautioned to seek legal advice in relation to requests for information centering on political views and activities. In particular, institutions were counseled to "discontinue the maintenance of membership lists of student organizations, especially those related to matters of political belief or action" (American Council on Education 1967).

By 1969 there was still a paucity of court action on this issue, but the American Bar Association was prepared with a comprehensive set of guidelines on student records. Consistent with the Joint Statement, those guidelines called for the maintenance of separate record files; access by every student to his files; notification to the student of any addition to or modification of his records; records on race, religion, political beliefs, and organizational membership to be established only with the express permission of the student; written consent from the student for the release of any information in his file, except: for "internal educational purposes," limited categories of data to any inquirer and "any information required under legal compulsion" (American Bar Association 1969).

Two cases decided in 1969, *Eisen v. Regents of the University of California* and *Cole v. Trustees of Columbia University,* appear to have disregarded the standards of confidentiality laid down in the statements issued by the American Council on Education and the American Bar Association. In both cases, however, a "public" interest was being served in the release of information. In *Eisen* the court declared that "the compelling interest of the public in being able to ascertain the information contained in the registration statement outweighs any minimal infringement of plaintiff's First Amendment rights" (quoted in O'Hara and Hill 1972, p. 62). The confidentiality of student records is a concern of sufficient moment to demand greater legal clarification and protection. In addition to

First Amendment rights, an individual's right of privacy would be a principle on which any law or court case would be based.

In general, the right of privacy has its roots in the Fourth Amendment and extends to another sensitive campus issue—a dormitory student's protection against unreasonable search and seizure. The Fourth Amendment affirms that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

An intention of the Fourth Amendment has been that one dimension of law enforcement shall, with closely defined exceptions, be attended by search warrants. The question immediately presents itself: Are student dormitory rooms covered by this rule? In 1968, the U. S. District Court in *Moore v. Student Affairs Committee of Troy State University* took the position that "college students who reside in dormitories have a *special relationship* [emphasis added] with the college involved" (quoted in O'Hara and Hill 1972, p. 154). The court tied the "special relationship," not to a "waiver" by a student of his Fourth Amendment right nor to the implications of a contract, but to the reasonable rules and regulations a college deems necessary to "protect campus order and discipline and to promote an environment consistent with the educational process" (p. 154). In placing dormitory residents in a "special relationship," the court applied a standard which was "lower than the constitutionally protected criminal law standard . . ." (p. 155).

Several articles have analyzed the implications of the decision in *Moore,* and at least three have been rather critical in their findings. G. W. Frick, in some extensive comments in the *Kansas Law Review,* expressed the feeling that "the *Moore* Court should have examined the importance of a warrant in searches of dormitory rooms and the impact of requiring one on the maintenance of discipline instead of the importance of the searches themselves" (Frick 1969, p. 518). The tenor of Frick's article is that colleges and universities would generally not be hampered in their maintenance of discipline and order if they were required to obtain warrants prior to searching dormitory rooms. In short, Frick was not persuaded by the double standard laid down in *Moore,* and he felt constrained to warn that "university officials should be aware that a subsequent judicial repudiation of the *Moore* doctrine is not inconceivable" (Frick 1969, p. 529).

Coming at the issue from a different perspective, Paul A. Bible also concluded that *Moore* was defective: "The great weakness of the *Moore* decision is its complete failure to meaningfully deal with the problem in light of recent search and seizure decisions of the Supreme Court" (Bible 1969, p. 64). Notes in the *Georgia Law Review* written under the initials T. J. A. concur with Frick and Bible in faulting *Moore*. However, the Notes did recognize that "under some circumstances, dormitory residents do occupy a special position with regard to searches by college officials. The right of privacy cannot always intervene" (Notes 1969, p. 454). The Notes then became suggestive of a distinction that would be an improvement on *Moore*: "the judiciary might distinguish two categories of searches conducted on college campuses: those for evidence potentially useful as a basis for criminal prosecution and those for evidence useful only in disciplinary hearings" (Notes 1969, p. 456).

If some important due process questions were left unclarified when Judge Frank Johnson decided the *Moore* case in 1968, he provided additional clarification when he decided *Piazzola and Marinshaw v. Watkins* in 1970. He did not deny the special relationship between the campus and students established in *Moore*, wherein the focus had been on university officials in their "reasonable exercise of . . . supervisory duties" in relation to university discipline. In *Piazzola*, Johnson found that "the search was instigated and in the main executed by State Police narcotic bureau officials" (quoted in O'Hara and Hill 1972, p. 157). This being the case, the more demanding criminal law standards of "probable cause" applied. The special relationship conferred on university officials a right that "cannot be expanded and used for purposes [i.e., criminal prosecution] other than those pertaining to the 'special relationship'" (p. 158). The convictions of the petitioners were overturned and Johnson's decision was affirmed by the U. S. Court of Appeals in 1971 (Chambers 1972, p. 113).

Another 1970 case, *Keene v. Rodger*, followed *Moore* and *Piazzola*. A student was suspended from the Maine Maritime Academy for possession of alcohol and narcotics. He sought a court injunction on the grounds that he had been denied his Fourth Amendment right. The court found the search was reasonable since it was "solely for the purpose of enforcing the Academy Rules and Regulations and of insuring proper conduct and discipline on the part of the cadet" (quoted in Chambers 1972, p. 114). It appears then that current case law sustains the double standard established in *Moore*

with respect to warrantless searches of dormitory rooms by university officials, providing that any evidence obtained is confined to university purposes. Should there be a "subsequent judicial repudiation" of *Moore* it will likely subscribe to the thesis of a 1968 case, *People v. Cohen:*

> University students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure. To suggest that a student who lives off campus in a boarding house is protected but the one who occupies a dormitory room waives his constitutional liberties is at war with reason, logic, and law (quoted in Chambers 1972, p. 115).

Turning briefly to a consideration of parietal rules, recent cases have followed the general pattern we have witnessed in considering other aspects of substantive due process. They have supported the universities in their formulation and enforcement of rules that appear reasonably consonant with their educational purposes. *Jones v. Vassar College,* 1969, supported Vassar in lifting the limitations on visiting hours by males. Unlike Vassar, William and Mary retained a "no intervisitation" rule, the breach of which led to some student suspensions. In *Buehler v. College of William and Mary,* 1971, there was judicial interference, but on procedural, not substantive grounds. The College was sustained in the promulgation of its "no visitation" rule. In a more sensitive case involving drug use and murder, the court in *Hegel v. Langman,* 1971, absolved the university of responsibility:

> A university is an institution for the advancement of knowledge and learning. It is neither a nursery school, a boarding school, nor a prison. . . . we know of no requirement of the law and none has been cited to us placing on a university or its employees any duty to regulate the private lives of their students, to control their comings and goings and to supervise their associations (quoted in Chambers 1972, p. 105).

These few examples drawn from case reviews of university prerogatives in the determination of parietal rules suggest that the courts do not demand homogeneity in the application of university purposes and functions. But whatever a university does with respect to parietal rules and residence hall governance, it should do so "first and foremost, from an educational point of view" (Frankell 1968, p. 34).

Procedural Due Process

As we leave substantive due process for a further consideration of procedural due process it is important to note the vital relationship between the two. In an earlier section of this report it was noted that *Dixon* was preoccupied with procedural due process. In a salient commentary on that case, Van Alstyne observed that "students may still complain that even the most scrupulous observance of procedural due process in American universities will be of little value if it is not coupled with an equal observance of substantive due process" (Van Alstyne 1963, p. 388). Some six years later the *Georgia Law Review* reflected this potential complaint: "Until the courts begin to recognize dormitory residents' substantive rights, their procedural innovations frequently will be empty formalities" (Notes 1969, p. 455). But the converse is also clearly the case. The substantive protections of the First, Fourth, and other Bill of Rights Amendments would be quite useless without the procedural safeguards called for in the *Dixon* case (Wright 1969, p. 1060); hence, the Siamese twin affinity between substance and procedure.

Following in the train of *Dixon,* commentary and practice relating to student discipline had achieved considerable procedural refinement by the late 60s and early 70s. In 1967 and 1968 the National Association of School Personnel Administrators conducted surveys of almost 500 institutions to determine "Institutional Policies on Controversial Topics" and "Institutional Approaches to the Adjudication of Student Misconduct." The results of the latter survey were reported by T. B. Dutton, F. W. Smith, and T. Zarle in the *Journal of the Association of Deans and Administrators of Student Affairs,* Monograph Number 2 (January 1969). They reported that most institutions incorporated the following features in their disciplinary procedures:

1. Attempt to inform the student of the charges against him, his rights and the judicial process that will be followed.
2. Permit some type of hearing.
3. Allow the student to be represented by some type of counsel, to call witnesses, to ask questions.
4. Base decisions only on the evidence presented at the hearing.
5. Give the student written notification of the decision and an explanation for any action.

6. Grant the right of appeal.
(cited in Christensen 1970, p. 35).

The 1968 NASPA survey finding was supported by the 1970 *Duke Law Journal* Project. The Project was designed to ascertain the degree to which higher education institutions subscribed in practice to the procedural standards identified in court cases and legal journals as being constitutionally required. Questionnaires were sent to every higher education institution known to the American Council on Education, over 2,000 in all. Some 536 colleges and universities sent in usable replies. The general conclusion of the project is both gratifying and significant: "The survey justifies the initial evaluation that most schools desire both to treat students fairly within the law and to protect life and property through the application of reasonable judicial procedures" (Project 1970, p. 793).

Ordinarily, the Fourteenth Amendment is the source of the Constitutional limitation in treating anyone "fairly within the law." The degree of fairness extended by any school should meet at least the Constitutional standard and hopefully would exceed it. "College rules do not derive their authority from the Fourteenth Amendment, and no college need show that its rule-making power is authorized by the Fourteenth Amendment. . . . the Amendment provides only that no state shall deny due process or equal protection" (Van Alstyne 1968b, p. 280).

Prior to the Hearing

It is assumed that most schools publish and give adequate publicity to a set of reasonable rules, the content of which is governed more by substantive than procedural due process. However, "the existence of rules is a basic issue of procedural due process. If no guides to proper conduct exist, the procedures for punishing conduct later determined to be illegitimate are fundamentally defective" (Project 1970, p. 767).

The recent literature on student discipline counsels that a student charged with breaking institutional rules should receive notification of the specific charges against him, be apprised of the nature of the evidence on which the charges are based, including the names of witnesses against him, and be allowed sufficient time to prepare a defense (Van Alstyne 1968a, p. 295; Wright 1969, p. 1071; American Bar Association 1970, p. 23; Project 1970, p. 768). Unlike the pattern witnessed in the discussion of the Fourth Amendment, there have been very few suggestions that the limitations of the Fifth Amend-

ment be imposed on university disciplinary proceedings. Also few, if any, cases have called for *Miranda* warnings in connection with university disciplinary activity. Yet the Project found that 77 percent of the responding institutions reported "the student had a right to remain silent during any pre-hearing investigation" (Project 1970, p. 771). The Project could thus conclude that the colleges appear to be ahead of the judiciary with respect to compulsory self-incrimination.

Interim suspension prior to a hearing is countenanced by a number of authorities, provided the use of this device is carefully circumscribed. The Joint Statement on Rights and Freedoms of Students recognized the necessity for such action to protect the charged student's "physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property" (American Association of University Professors et al. 1967, p. 368).

In *Stricklin v. Regents of the University of Wisconsin,* 1969, the courts held that wherever possible, a preliminary hearing should precede an interim suspension. The preliminary hearing would not preclude the necessity of a full hearing at the earliest possible date (American Bar Association 1970, p. 24; Chambers 1972, p. 230; Project 1970, p. 774; Wright 1969, p. 1075). While some have assumed that the preliminary hearing was to be granted on student request, Judge James E. Doyle in *Vicki Marzette v. McPhie,* 1968, held that this represented inadequate protection. Doyle's logic was sustained by Judge Frank G. Theis in *Gardenhire v. Chalmers,* 1971: "The right of review, or a hearing only upon request, does not serve to protect the right of the student in fundamental fairness in this type of proceeding. One does not have to be a supplicant for allowance of a constitutional right" (quoted in Chambers 1972, p. 233).

The Hearing

Dixon held that a student's right to a hearing when he is threatened with serious disciplinary action must be protected. Most recent commentaries have followed *Dixon* in this requirement. Wright has proclaimed there is "general agreement" that the opportunity for a student to be heard in his own defense is one of "four fundamental safeguards" that should attend every proceeding where suspension or expulsion may follow (Wright 1969, p. 1071).

The composition and procedures of the hearing tribunal are quite properly related to the character of the violation and potential

sanction to be imposed. Minor offenses leading to no greater penalty than disciplinary probation are often adjudicated on an informal basis by a coordinator of discipline, judicial administrator, or ombudsman. But if the violation is more serious and can lead to suspension or expulsion, an informal hearing will not suffice.

Virtually all commentaries call for "impartial" hearings. In order to assure acceptance of the hearing and the decision by the campus, the composition and procedures of the hearing board should receive careful attention. Apart from concern for impartiality, the American Bar Association Commission on campus government and dissent was not particularly anxious with respect to the composition of the board: "Fundamental fairness does not require any particular kind of tribunal or hearing committee, nor does it necessarily require that the finder of fact comes from or (in the case of a group) be composed of any particular segments of the university community" (American Bar Association 1970, p. 23). Other commentaries and reports have been less casual.

The President's Commission on Campus Unrest felt the hearing and decision would gain greater respect if the disciplinary process were adversary in character, "with a clear separation of the role of prosecutor from that of judge" (President's Commission on Campus Unrest 1970, p. 130). The Commission felt that all too frequently the adjudication function has been in conflict with other administrative responsibilities. It counseled the use of "outside hearing examiners, attorneys, and investigators"—especially if the violation involved campus disruption—the position being that "outsiders" could "adjudicate with an impartiality often lacking in the traditional university tribunal." Furthermore the Commission recommended a "tribunal with a broad base of participants—including both students and faculty members" (1970, pp. 130-131).

The position of the President's Commission was echoed by the Carnegie Commission on Higher Education. It felt there was too little attention to conflicting functions of campus administrators which often included the role of police, prosecutor, and judge (Carnegie Commission on Higher Education 1971, p. 93). In resolution of this problem, the Carnegie Commission recommended the consideration of a hearing officer, a "campus attorney" to prosecute, and a hearing board composed of individuals "partially or totally" external to the campus, including lawyers, judges, and campus personnel other than administrators (1971, pp. 97-98).

The *Duke Law Journal* Project reported that the bulk of the re-

sponding institutions favored an integrated or broadly based hearing board, including faculty and students as well as administrators. In commenting on the wide concern over the conflict of functions, the Project also noted that "due process does not require *strict* separation of functions although any combination of prosecutorial and adjudicatory roles will be closely scrutinized by the courts" (Project 1970, pp. 781-783).

In this judgment, the Project was on target. The Court of Appeals in *Shasta Joint Junior College District v. Perlman* did not forbid the combination of functions, but it did admonish that "if the record shows bias and prejudice upon the part of the administrative body, its decision will not be upheld by the courts" (quoted in Chambers 1972, p. 222). The court in *Stewart v. Reng*, 1970, delivered on that claim: "The composition of the hearing panel was inadequate under constitutional standards because its chairman, who was also one of its members, participated in the hearing as a witness" (quoted in Chambers 1972, p. 222). Finally, the Project cautioned against a combination of roles: "Where at all possible, universities should avoid this highly suspect practice" (Project 1970, p. 783).

Many would express chagrin at the loss of mutual trust implied in any adversary proceeding. While mutuality has been characteristic of the academic enterprise, Monypenny reminds us that "interests are in fact diverse, and that the relationships of power are quite unequal. What happens to the organization in its relation to any individual is not very consequential to the organization. It is utterly important to the individual" (Monypenny 1968, p. 751).

Whatever the composition of the hearing tribunal, Theodore J. St. Antoine has suggested the following five criteria in structuring an all-campus judiciary. The tribunal must be:

1. Competent and capable
2. Fair and impartial
3. Acceptable
4. Suitable for doing the particular job entrusted to it
5. Consistent with the traditions of the particular institution where it is established (St. Antoine 1971, pp. 53-54).

There has been some expression to the effect that for a hearing to be fair it must be open to the public. However, there appears to be no demonstrable link between fundamental fairness and a public hearing. If anything, experience of recent years could lead to the inference that there may be an inverse relationship between the desire for fairness and a hearing open to the public. *Zanders v. Louisiana State Board of Education*, 1968, denied that students

had a right to a public hearing. The court held that "no citation of authority has been submitted, and indeed there is none, which necessitates a public hearing in such matters" (quoted in Chambers 1972, p. 225). The Project concluded that students cannot properly claim a right to a public hearing, but that the issue of open versus closed hearings should be left to the discretion of each institution (Project 1970, p. 780).

Dixon did not require that students be granted the right of counsel, but as Van Alstyne predicted in 1963, there has been considerable expansion of *Dixon* during the past decade. Van Alstyne also argued for the right to counsel under the aegis of the principle he enunciated in his 1963 article: "The degree of protection to which a student is entitled in the process of determining his guilt and punishment is in direct proportion to the harm which could result to him from such determination" (Van Alstyne 1963, p. 381). Five years later, Van Alstyne was still arguing that the right of counsel was one of the minimal elements of procedural due process (Van Alstyne 1968a, p. 295). By 1969, Wright could assert that "most major campus universities permit a student to be assisted by a lawyer at a disciplinary proceeding if he chooses to be" (Wright 1969, p. 1075). In 1970, the Commission on Campus Government and Student Dissent argued rather persuasively that "a student should have the right to be represented at a hearing by any person selected by him, such as a fellow student, a faculty member, a lawyer, or a friend from outside the University community" (American Bar Association 1970, p. 24). The Commission recognized that the presence of a lawyer would alter the traditional character of the disciplinary proceedings. While expressing indirect sympathy for nostalgia, the Commission affirmed that "a hearing on charges of misconduct is an adversary proceeding" and that there may be occasions when the university should present its case to an attorney and that the services of a hearing officer, also an attorney, should be obtained (American Bar Association 1970, p. 24). However, the Project reported in the same year: "A substantial number of schools prefer a situation where neither the student nor the administration is represented by counsel, a position possibly reflecting a dearth of legally-trained personnel to conduct a strict adversary proceeding and a fear of the complexity and formalism of such a proceeding" (Project 1970, p. 785). Given these conflicting values, Chambers could still conclude in 1972 that "the trend of decision-making will be in the direction of recognizing the right to counsel" (Chamber 1972, p. 225).

By logical extension, the proper inference to be drawn from granting the right to a hearing and the right to counsel is that the disciplinary proceeding is to be more than a passive affair. The student obviously has the right to be heard, to examine and respond to evidence against him, and to present evidence and testimony, including witnesses in his own behalf. Eighty-one percent of the schools responding to *The Duke Law Journal* Project allowed this privilege (Project 1970, p. 787).

Less clear is the authority protecting the principles of confrontation and cross-examination. In 1968 Van Alstyne argued for these as being "essential elements of fair procedure" (Van Alstyne 1968a, p. 295). A year later Wright reported that while many tribunals allowed for confrontation and cross-examination the allowance was not granted as "a matter of right." But Wright also advised his readers that should the "credibility" of a hearing be at stake, "cross-examination is the condition of enlightened action and is therefore required in the interest of fairness and reasonableness" (Wright 1969, p. 1076). This position was supported by the 1970 Project: "In most of the recent cases confrontation and cross-examination of witnesses has been allowed before hearing boards with judicial approval" (Project 1970, p. 785).

There is a coalescence among commentators around the point that any decision and possible sanction should be based only on substantial evidence presented at the hearing. These same commentators also generally agree that either the university should provide the student with a transcript of the hearing or allow him to make a record of it. Finally, the results of the proceedings should be available for inspection by the student (Van Alstyne 1968a, p. 295; Wright 1969, p. 1071; American Bar Association 1970, p. 24; Project 1970, pp. 788-791; Chambers 1972, p. 226).

Post Hearing Review

Providing the student with a transcript of the hearing or allowing him to make a record of it and also making the results of the proceedings available for his inspection not only serve the rudiments of procedural due process, but also enable the student to assess the grounds for and to prepare a possible appeal. While only a bare majority of institutions specifically provide for appellate review, such a review would seem to be a proper extension of the requirements of fundamental fairness. "No case has held that a college must provide for institutional review of the hearing panel's decision, but

procedures embodying such an appellate framework have been impliedly endorsed by the courts which state that the student has a right to make a transcript of the proceedings before the hearing panel" (Project 1970, p. 792).

Double Jeopardy and Overlapping Jurisdictions

A surprising number of commentators have assumed that if a student violates a rule common to two or more jurisdictions and faces disciplinary action in more than one of those jurisdictions, there is danger of double jeopardy. While a university should never be casual in imposing an additional sentence on a student who has been found guilty and sentenced in a court of law, it would *not*, as Harms has concluded, "be a violation of [his] rights to assign another sentence" (Harms 1970, p. 23). There is general consensus in the literature on student discipline that a college or university ought to avoid mere duplication of court action. If the decision is made to assign an additional sentence, that assignment should serve clearly identified educational objectives.

> Students who violate the law may incur penalties prescribed by authorities, but institutional authority should never be used merely to duplicate the function of general laws (American Association of University Professors et al. 1967, p. 367).

> Student conduct subject to university discipline . . . may also simultaneously be violations of the law. This is irrelevant to establishing the boundaries of university discipline . . . but is relevant to whether the university will choose to exercise its jurisdiction (Report to the University Commission on Interdependence of University Regulation and Local, State, and Federal Law, 1967).

The point of this last citation is that whether the university chooses to exercise its jurisdiction must be predicated on educational issues, not double jeopardy.

> *Double jeopardy*, which is proscribed by the U. S. Constitution, protects a person from being tried twice for the same offense. It is not considered the same offense, and hence, the protection does not apply, when the person's action constitutes several offenses tried by one jurisdiction or separate offenses against different jurisdictions for which he is tried by those jurisdictions. Technically, then, the responsibility of students to the university and the civil society, wherein the same misconduct could be punishable by both, occasions no double jeopardy (Report of the University Commission on Interdependence of University Regulations and Local, State, and Federal Law, 1967).

The student is not unlike other individuals living in an organized

society; he is simultaneously a member of several communities. The laws of these several communities often overlap, but not without subordination and superordination in the application of the laws. The most delicate relationship in these overlapping jurisdictions is the one between the campus and the community contiguous to the campus. While American colleges and universities have never been accorded the status of sanctuaries, a dubious honor enjoyed by universities in a number of foreign countries, they are often viewed as "geographical enclaves in which the civil authorities do not intrude to the same extent as in other parts of the community" (McKay 1968, p. 564). This "quasi-immunity from police surveillance" comes at a proper price: "Some obligation to report violations of law that would ordinarily be prosecuted by civil authorities" (McKay 1968, p. 564). McKay qualified this obligation in suggesting that "there is undoubtedly a *de minimis* principle that excuses the university from having to report every minor infraction of the law by its students" (McKay 1968, p. 565).

Frequently, campuses have assumed sole jurisdiction where students have engaged in minor violations of general law that also represent infractions of the campus code. McKay supported this course in 1968, but it has been challenged more recently by the Carnegie Commission on Higher Education. While recognizing that "many offenses are handled inside the family, or the work place or the club, without complaints to law enforcement personnel," the Commission concluded that "there is no strong argument for the campus to handle cases which involve the general law . . . consequently, it is generally better to let the law take its course" (Carnegie Commission on Higher Education 1971, p. 95).

Van Alstyne challenged another not uncommon practice on both educational and legal grounds. He called for serious review of a procedure related to overlapping campus and state rules where "a number of colleges have established working relations with the downtown police so that the alleged offender is released to the college and favored in this regard over non-students arrested under identical circumstances" (Van Alstyne 1968b, p. 602). At the same time, Van Alstyne allowed that a college could take a direct interest in a student's involvement with a court. The occasion for this interest would be when "the student may be far from home, in need of counsel, and practically disadvantaged in comparison with a local resident" (Van Alstyne 1968b, p. 602).

Concluding Note

The burden of this report has been to reflect recent literature and, to a lesser extent, practice relating to the disciplining of college and university students. What has clearly emerged during the past decade, particularly since the historic *Dixon* case of 1961, is a heightened sensitivity to the rights of students, both substantive and procedural. While very few commentators have expressed regret over this development, regret has focused on a concomitant by-product of this new deference to student rights—the adversary character of the disciplinary system, especially the formal procedures. To the extent this represents a loss of mutuality, the loss is genuine and worthy of regret.

Paul D. Carrington in a thoughtful article, "On Civilizing University Discipline," has concluded that "the whole movement in the direction of identifying university discipline with criminal punishment is unlikely to produce anything but frustration, misunderstanding, and related commodities similarly in over supply" (Carrington 1971, p. 72). Carrington, a professor of law, documents the failure of criminal law to adequately serve the larger society and by a series of inferences attempts to demonstrate its inadequacies as a model for university discipline. His appeal is that the best guarantee of civilizing university discipline is to reject the criminal law model in favor of alternatives available in civil law: "There is no room for debate that a system designed to follow a model of civil remedies rather than criminal punishment will function much more smoothly in the university setting" (Carrington 1971, p. 88).

Whether Carrington's civil law model portends a new movement in university discipline, his approach does soften the adversary character identified with criminal punishment. Whatever system is employed by a university community, this writer would hope that most problems could be resolved in an informal manner without resort to formal disciplinary procedures. In the informal setting the "functions of advice, guidance, and assistance" (Monypenny 1967, p. 748) and, hence, "mutuality" can be operative, and the university community is probably better served when they are.

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